TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 151.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO, PLAINTIFF IN ERROR,

vs.

JULIO P. CASTRO.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

FILED NOVEMBER 16, 1905.

(19,991.)

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1 In the District Court of the United States for Porto Rico.

At an adjourned term of the District Court of the United States of America, within and for the District of Porto Rico, convened for and to be begun and holden at the court rooms of said court in the city of Mayaguez, on the fourth Monday of May, being the twenty-second day of that month, and subsequently adjourned by order of Court until the 24th day of said month, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred and twenty-ninth.

Present: The Honorable Chas. F. McKenna, Judge.

Among the proceedings had were the following, to wit:

JULIO P. CASTRO, a Citizen of Porto Rico, Residing in the Town of Cabo Rojo, Porto Rico, Plaintiff,

vs.

AMERICAN RAILROAD CO. OF PORTO RICO, a Corporation Existing Under and by Virtue of the Laws of the State of New York, Defendant.

Be it remembered that heretofore, to wit, on the 14th day of March, 1905, came the plaintiff by his attorney and filed in the clerk's office a complaint in this cause, which said complaint is as follows, to wit:

2 *Complaint.*

In the District Court of the United States in and for the District of Porto Rico.

JULIO P. CASTRO, a Citizen of Porto Rico, Residing in the Town of Cabo Rojo, Porto Rico, Plaintiff,

vs.

AMERICAN RAILROAD CO. OF PORTO RICO, a Corporation Existing Under and by Virtue of the Laws of the State of New York, Defendant.

Julio P. Castro, a citizen of Porto Rico, residing at Cabo Rojo, Porto Rico, complains of the American Railroad Company of Porto Rico, a corporation existing under and by virtue of the laws of the State of New York, and for cause of action alleges:

That during all the times hereinafter mentioned the defendant was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, possessing, owning, operating a steam railroad in, over and upon the Island of Porto Rico, and more particularly a line of steam railroad between the towns of Mayaguez and San Germán, Porto Rico. That the said line of railroad possessed, owned and operated by the defendant, crosses a certain public highway leading from the said town of San Germán to the

said town of Mayaguez, at almost right angles; that the said crossing is called "El Paso de Nivel," said crossing being located at a point where the road from the town of Hormigueros runs into the said public highway, and situated about two hundred yards north of a certain bridge known and commonly called "San Antonio," said crossing being about two kilometers north of the point where the road from the town of Cabo Rojo runs into the aforesaid
3 public highway extending between the town of San Germán and Mayaguez as aforesaid.

Plaintiff states that on or about the eighteenth day of February, one thousand nine hundred and five, Eloisa Castro, unmarried, a minor of the age of seventeen years, more or less, daughter of the plaintiff, in company with her mother, Felica Cardona de Castro and Francisco Rodriguez, with two horses and coach, was riding along in a prudent and careful manner along said public highway, coming from the southwest, to the northeast, intending to pass over said railroad track at the aforesaid intersection of the railroad track and public highway, and going in the direction of the city of Mayaguez, Porto Rico; that when said Eloisa Castro was approaching said track in a careful and prudent manner and going at a very slow rate of speed, so as to avoid any danger, and without any negligence on her part or upon the part of her companions said Felicta Cardona de Castro and Francisco Rodriguez, and when upon said railroad track of the defendants, the defendants' engine, coaches and cars propelled by steam, as aforesaid, approached said public highway, coming from a northwesterly direction and going in a southeast-ly direction on said railroad track at an unusual and very great rate of speed, to wit, thirty miles per hour, and came upon and over said crossing and public highway without slowing up as required by law, or having given, or caused to be given, any warning of approach of said engine, coaches and cars, and without any flagman or other servant there stationed to warn people walking, passing or riding along said public highway over said crossing, of the approach of said engine, coaches and cars, and without ringing the bell or blowing the whistle on said locomotive engine as required by law, and which was then and there placed upon said locomotive engine, which was then and there propelling the said coaches and cars, and without having any
4 signs to warn the public that said railroad crossed the said public highway at that point, and without having any gates to keep persons, vehicles and the public from entering in and upon said tracks while the said engine, coaches and cars were passing over said highway, and without having any careful and prudent method or means of notifying the said Elosa Castro, or the public, of the approach of said engine, coaches and cars.

And the said defendants, then and there by its agents, servants and employés in charge of said engine, coaches and cars, so carelessly, negligently and improperly managed, moved and conducted the same, that by and through the carelessness, negligence and improper conduct of the defendant, by its agents, servants and employés in their behalf, said engine of said defendant, as said horses and said coach in which the said Eloisa Castro and said Felicia

Cardona de Castro and Francisco Rodriguez were riding, arrived at and upon said railroad track, then and there ran into and struck with great force and violence upon and against the said coach in which said Eloisa Castro was sitting, and which was passing over said railroad track, thereby throwing said Eloisa Castro and said Felicia Cardona de Castro and Francisco Rodriguez violently to the earth.

Plaintiff states that by reason of said collision caused by the negligence and carelessness of the agents, servants and employés of said defendant, in charge of said engine, coaches and cars, the said Eloisa Castro was so greatly bruised, mangled and hurt, that she died almost instantly after the said collision.

Plaintiff states that he has been damaged by the careless and negligent acts of the defendants' agents, servants and employés, as aforesaid, in causing the death of his daughter, the said Eloisa Castro, who at the time of her death and at all times prior thereto, had been making her home with plaintiff, in the sum of fifteen thou-
5 sand dollars ($15,000).

Wherefore, plaintiff asks judgment for fifteen thousand dollars ($15,000) and all costs herein incurred and expended.

FREDERICK L. CORNWELL.

Summons.

In the District Court of the United States for Porto Rico.

161, C. L.

JULIO P. CASTRO, a Citizen of Porto Rico, Residing in the Town of Cabo Rojo, Porto Rico, Plaintiff,

vs.

AMERICAN RAILROAD COMPANY OF PORTO RICO, a Corporation Existing Under and by Virtue of the Laws of the State of New York, Defendant.

UNITED STATES OF AMERICA, *District of Porto Rico, ss:*

The President of the United States of America to the American Railroad Company of Porto Rico, a corporation existing under and by virtue of the laws of the State of New York, defendant herein:

You are hereby notified that there has been filed in the Clerk's office of the aforesaid Court, a certain declaration by the above-named plaintiff against you, in which plaintiff claims damages against you for the sum of fifteen thousand dollars and costs, by reason of the death of Eloisa Castro, his daughter, caused by the negligence and carelessness of the company's employees in charge of the railroad train, while crossing the public highway running from Mayaguez to San Germán on or about the eighteenth day of February, A. D. 1905.

You are hereby required to appear and answer said declaration

within ten days from the date of service hereof, at the Clerk's
6 office of this Court at Mayaguez, Porto Rico, otherwise the said plaintiff will apply to the Court for the relief demanded in the said declaration, to wit, $15,000 and costs.

Witness the Honorable Chas. F. McKenna, Judge of the District Court of the United States for Porto Rico, this 16th day of March, A. D. 1905, at the city of Mayaguez, P. R.

[L. S.] H. H. SCOVILLE, *Clerk*,
By RICARDO NADAL, *Deputy*.

Return on Service Writ.

UNITED STATES OF AMERICA, *The District of Porto Rico, ss:*

I hereby certify and return that I served the annexed writ on the therein-named American Railroad Company of Porto Rico by handing to and leaving a true copy thereof, together with a copy of complaint, with Mr. A. Duval, Gen'l Manager of the above company personally at San Juan, in said District, on the 22nd day of March, A. D. 1905.

____ ____,
U. S. Marshal.
JOHN L. HAAS,
Deputy.

Demurrer.

Filed March 31, 1905.

In the District Court of the United States for Porto Rico, Sitting at Mayaguez.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

The above-named defendant, the American Railroad Com-
7 pany of Porto Rico, by its attorney F. H. Dexter, demurs to the complaint filed herein, and for cause of demurrer says:

(1) Plaintiff ought not to recover herein for the reason that the said complaint does not set forth a cause of action.

(2) For special grounds of demurrer defendant says that plaintiff ought not to recover for the reason that by the laws of Porto Rico plaintiff would be entitled only to support from the deceased daughter Eloiza Castro, if any right of action he may have at all; and that even if plaintiff should have a right of action for such support the same can be awarded only by monthly payments in advance; by reason of which this court is without jurisdiction to render a judgment in accordance with such law.

(3) Defendant further demurs to the said complaint for the reason that if any obligation existed upon the part of the deceased Eloiza

Castro to support her father, the plaintiff herein, such obligation ceased at the time of her death, and therefore plaintiff has no cause of action.

Wherefore, defendant prays that the said complaint be dismissed and that it be awarded its costs herein.

F. H. DEXTER,
Attorney for Defendant.

Objection to Jurisdiction of Court.

Filed May 23, 1905.

In the District Court of the United States for Porto Rico.

JULIO CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Defendant in the above-entitled action comes now by its attorney, F. H. Dexter, and objects to the jurisdiction of this court to try this cause under the terms and provisions of Section 670 of the
8 Revised Statutes of the United States, for the reason that all terms of this court held in the city of Mayaguez under and by the terms and provisions of the Act of March 12, 1900, creating a civil government in Porto Rico, and particularly the present term at which the above cause is set for trial, is a special term of this court, and therefore this court is without jurisdiction to try the issues in this cause by a jury.

Wherefore, defendant prays for an order either dismissing this cause or transferring the same for trial at a regular term of this court to be held at either San Juan or Ponce.

F. H. DEXTER,
Attorney for Defendant.

Journal Entry.

May 25, 1905.

No. 161.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

The objections to the jurisdiction heretofore filed herein are heard and overruled in accordance with the formed opinion of the Court upon this question. The defendant excepts to said ruling. The demurrer to the complaint is heard and overruled, to which said defendant excepts. Thereupon comes said defendant and files an answer. Whereupon comes the plaintiff and files a demurrer to the said answer, which is heard and overruled, to which said plaintiff excepts.

9 *Answer.*

Filed May 25, 1905.

In the District Court of the United States for Porto Rico.

JULIO P. CASTRO, a Citizen of Porto Rico, Residing in the Town of Cabo Rojo, Porto Rico, Plaintiff,

vs.

AMERICAN RAILROAD — OF PORTO RICO, a Corporation Existing under and by Virtue of the Laws of the State of New York, Defendant.

For answer to the complaint filed in the above-entitled action, the defendant answers and alleges as follows:

1. Defendant denies all of the allegations in the said complaint contained, except that it is a corporation existing under and by virtue of the laws of the State of New York, and that at the time mentioned in the said complaint it operated a steam railroad in the Island of Porto Rico.

2. For a separate and further answer, the defendant alleges that the accident in the said complaint set forth was caused by the negligence of Eloisa Castro, whose death is alleged to have been the result of the same, Felicia Cardona de Castro, mother of the said Eloisa Castro, and Francisco Rodriguez, the coachman who was driving the horses attached to the coach described in plaintiff's complaint, which negligence consisted in the neglect and failure of the said Eloisa Castro, Felicia Cardona de Castro and Francisco Rodriguez to take the ordinary precautions incumbent upon prudent persons before crossing the track of defendant; and also because of their failure and neglect to heed the warnings and signals given by the employés of the train which caused said accident, and because of the failure of the said parties to stop, look and listen for the approach of said train, and because of their failure to heed the ringing of the
10 bell and the whistling of the locomotive attached to said train, and because of their reckless and negligent driving upon and across the track of defendant company in front of said train before the employés and agents of defendant company in charge thereof could, by the exercise of reasonable diligence, avoid the accident and injury set forth in said complaint, and because the said Eloisa Castro, the said Felicia Cardona de Castro and the said Francisco Rodriguez, each and all of them, had seen or knew of the immediate presence and approach of said train, and heard the same and the signals given by the engine driver in time to have avoided the accident if they had acted with ordinary care; by reason of all of which the said Eloisa Castro, Felicia Cardona de Castro and their agent and servant Francisco Rodriguez were guilty of contributory negligence, the same resulting in the accident complained of in plaintiff's complaint.

Wherefore defendant prays that said complaint be dismissed and that defendant have its costs and disbursements herein.

F. H. DEXTER,
Attorney for Defendant.

WILLIS SWEET,
Of Counsel.

Demurrer to Answer.

In the District Court of the United States for Porto Rico.

JULIO P. CASTRO, Plaintiff,
vs.
THE AMERICAN R. R. CO. OF PORTO RICO, Defendant.

Now comes the plaintiff by his attorney F. L. Cornwell, and demurs to the answer of the defendant, and for reason states:

First. That in paragraph 1 it denies all the facts contained
11 in the complaint filed by the plaintiff except that defendant is a corporation existing under and by virtue of the laws of the State of New York, and that at the time mentioned it was operating a steam railroad in the Island of Porto Rico, all of which is inconsistent with the facts alleged in the second paragraph of the said answer, which admits that there was an accident and that the said Eloisa Castro was killed.

Second. That, that part of the answer beginning in the fourth line of the second page and continuing as follows: "And because of the failure of said parties to stop, look and listen for the approach of said train," does not constitute any defense, as the laws of Porto Rico do not require the public to stop, look and listen at a public railroad crossing.

Third. That the second paragraph of said answer does not constitute any defense, in that it does not allege affirmatively that the railroad company had provided the necessary gates, flagmen and other protection at the said crossing, as is required by law, and further that the defendant does not allege that the contributory negligence of the said Eloisa Castro, Felicia Cardona de Castro and Francisco Rodriguez, was gross, wanton or willful on their part.

F. L. CORNWELL,
Attorney for Plaintiff.

Journal Entry.

May 25, 1905.

No. 161.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Now comes F. H. Dexter, attorney for the defendant, and moves that the name of Hon. Willis Sweet be entered as of counsel
12 for the defendant. Whereupon said cause is called for trial, and both sides answer ready. Whereupon the Marshal sum-

mons Fred Leser, Jr., William Falbe, E. Ramirez and Julio Mangual. Thereupon comes a jury composed of the following named persons, to wit: F. L. Cole, Adolfo Camps, R. L. Stratton, E. Sanchez, W. E. Moore, O. E. Rand, Theron Potts, F. Garcia, B. Sanchez, Fred Leser, Jr., E. Ramirez and Julio C. Mangual, and who are duly impaneled and sworn to try the case according to the testimony.

Journal Entry.

May 26, 1905.

No. 161.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Resumed. The jury hears a part of the testimony on behalf of the plaintiff.

Journal Entry.

May 27, 1905.

No. 161.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Resumed. Now Comes F. H. Dexter, attorney for the defendant, and files a motion to have the jury visit the scene of the accident complained of in this case. The jury hears the conclusion of the testimony for the plaintiff.

13 *Journal Entry.*

May 29, 1905.

No. 161.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Resumed. The jury hears part of the testimony on behalf of the defendant.

Journal Entry.

May 30, 1905.

No. 161.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Resumed. The jury hears the conclusion of the testimony for the defendant.

Journal Entry.

May 31, 1905.

No. 161.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Resumed. The jury hears argument of counsel for both sides, the charge of the Court, and then retires. And thereafter the jury returns with the following verdict, to wit: "12 P. M. May 31, 1905. The jury finds a verdict for the plaintiff in the sum of $1,600 (sixteen hundred dollars). Frank L. Coleman, Foreman."

14 *Journal Entry.*

June 1, 1905.

No. 161.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Judgment.

This case coming on to be heard, the said parties appearing by their attorneys, the jury of twelve persons were regularly impaneled and sworn to try this action, and having heard the evidence, the argument of counsel and the instructions of the Court, retired to the jury room and thereafter returned a verdict for the plaintiff for the sum of sixteen hundred dollars.

It is therefore ordered and adjudged that the plaintiff have and recover from the defendant, the American Railroad Company of

Porto Rico, the sum of sixteen hundred dollars ($1,600), together with the costs of said action, and interest thereon from the date of this judgment at the rate of 6% per annum.

Made and entered on this 1st day of June, 1905.

Journal Entry.

June 1, 1905.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Now comes defendant herein, by F. H. Dexter of counsel, and files motion in arrest of judgment, which motion is heard and overruled.

Thereupon defendant files petition for extension of time for
15 filing assignment of errors and bill of exceptions. The Court grants until June 10th to file said assignment of errors and bill of exceptions, to which plaintiff excepts.

Motion in Arrest of Judgment.

Filed June 1, 1905.

In the District Court of the United States for Porto Rico.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Defendant, by its attorney F. H. Dexter and Willis Sweet of counsel, moves in arrest of judgment herein for the following reasons, to wit:

(1) Because this Court was without jurisdiction to try this cause before a jury, this term being a special term of Court, and not being a regular term provided for by Act of Congress of the United States, and particularly because of the provisions of Section 670 of the Revised Statutes of the United States.

(2) Because plaintiff has no cause of action herein, and because the demurrer of defendant to the complaint herein should have been sustained, since, by the law of Porto Rico, the only cause of action which plaintiff might have would be an action for support, and not an action for damages as prayed.

F. H. DEXTER,
Attorney for Defendant.

WILLIS SWEET,
Of Counsel.

16 *Motion.*

Filed June 1, 1905.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Motion Requesting an Extension of Time for Filing Assignment of Errors and Bill of Exceptions.

Defendant respectfully represents to this Court that it is about to sue out a writ of error from the judgment of this Court rendered against it this day in the above-entitled cause, and that, owing to the contemplated adjournment of this Court within the next three days, it is a physical impossibility for defendants to prepare the assignment of errors and bill of exceptions for such writ of error.

Wherefore defendant prays that a reasonable time, not to exceed June 10th next, will be allowed it and its counsel for the preparation and filing of such assignment of errors and bill of exceptions.

F. H. DEXTER,
Attorney for Defendant.

WILLIS SWEET,
Of Counsel.

Petition for Writ of Error.

Filed June 1, 1905.

In the District Court of the United States for Porto Rico.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

17 The American Railroad Company of Porto Rico, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the first day of June, 1905, comes now, by F. H. Dexter its attorney and Willis Sweet of counsel, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the honorable the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that, upon the giving of such security, all further proceedings in this Court be suspended and stayed until the decision of said writ of error by the Supreme Court of the United States.

And your petitioners will ever pray.

F. H. DEXTER,
Attorney for Defendant.

WILLIS SWEET,
Of Counsel.

Journal Entry.

June 1, 1905.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Order Allowing Writ of Error.

At this, the special term of this Court held in the City of Mayaguez on the first day of June, 1905, upon motion of F. H. Dexter, attorney for defendant, and Willis Sweet, of counsel, in the above-entitled cause, and upon filing a petition for a writ of error, it is ordered that a writ of error be, and hereby is allowed to have reviewed in the Supreme Court of the United States the judg-
18 ment heretofore entered herein, and that the amount of bond on said writ of error be, and hereby is fixed at the sum of four thousand dollars ($4,000), and upon the giving of the same and its approval by this Court and the Judge thereof within the time allowed by law, the same shall operate as a supersedeas and the judgment herein shall be stayed until otherwise ordered by the Supreme Court of the United States, to which plaintiff excepts.

CHAS. F. McKENNA, *Judge.*

Journal Entry.

June 8, 1905.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Now comes the defendant herein, by its attorney F. H. Dexter, and files a motion for an extension of time until the 20th of this month to file its assignment of errors and bill of exceptions herein, and said motion being considered, is granted.

Motion.

Filed June 8, 1905.

In the District Court of the United States for Porto Rico.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Motion of Defendant for an Extension of Time Within Which to File Assignment of Errors and Bill of Exceptions.

Comes now the defendant in the above-entitled cause, by its attorneys, F. H. Dexter, and represents that by the order of this Court

made on the first day of June it was allowed ten days from
19 such date to file its assignment of errors and bill of exceptions for the purposes of a writ of error herein to the Supreme Court of the United States. But defendant states that owing to the official duties of the stenographer of the Court he has been unable to write out and furnish to defendant or its counsel the transcript of the testimony taken by him during the trial hereof, and that it would be physically impossible for him to prepare the said transcript of said cause within the time limited as aforesaid, and that it would be impossible to so prepare it unless an additional time is granted.

Wherefore, defendant prays that it be allowed until the 20th of this month to file its assignment of errors and bill of exceptions.

F. H. DEXTER,
Attorney for Defendant.

Journal Entry.

June 15, 1905.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Now comes the plaintiff herein by N. B. K. Pettingill on behalf of F. L. Cornwell, attorney for plaintiff, and files a motion to vacate an order heretofore entered herein extending the time for filing bill of exceptions by defendant. Said motion is heard and submitted.

20 *Motion to Vacate Order.*

Filed June 15, 1905.

In the District Court of the United States for Porto Rico.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Now comes the plaintiff, by his attorney F. L. Cornwell, and moves to vacate and set aside the order entered herein on the — day of June, 1905, extending the time allowed to defendant for settling its bill of particulars (exceptions) herein, on the ground that said order of extension was made after the final adjournment of the term of this Court at which the judgment appealed from was entered, and hence was improvidently granted because beyond the power of the Court.

F. L. CORNWELL,
Attorney for Plaintiff.

Journal Entry.

June 16, 1905.

JULIP P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

The motion heretofore filed in the above-entitled case to vacate the order extending time for filing bill of exceptions having been taken under advisement, said motion is overruled.

21 *Journal Entry.*

June 19, 1905.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Now comes F. H. Dexter, attorney for the defendant in the above-entitled cause, and files its assignment of errors, and the bill of exceptions is signed and settled.

22 In the District Court of the United States for Porto Rico, Sitting at Mayaguez.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Bill of Exceptions.

This cause came on for hearing before the Honorable Charles F. McKenna, Judge, and a jury.

Present: Messrs. Horton & Cornwell, Attorneys for plaintiff, and F. H. Dexter and Willis Sweet, Attorneys for defendant, when the following proceedings were had, to-wit:

During the course of the trial and at the beginning thereof, during the testimony of the first witness, José Remote y Fajardo, the question was asked by counsel for plaintiff, of the witness: "Is there or is there not a gate there?" referring to the crossing of the highway over the railway of defendant company where the accident occurred.

Counsel for defendant objected to this question for the reason that there was no obligation on the part of the railroad company, defendant, to maintain either a guard or a gate at the cross-
23 ing, which objection the Court overruled and allowed the witness to answer: "No, sir."

The Court said in ruling upon the objection made by counsel for defendant: "I will admit that subject to a renewal of the objection later. At the conclusion of the case, the jury will be given a recess and the law questions will be heard and discussed then. You may except now to the ruling."

To which ruling of the Court, the defendant, by its counsel, excepted.

During the progress of the trial and in the testimony of various witnesses, the following proceedings were had and took place:

In the testimony of the witness Don Mateo Fajardo, he was asked by counsel for plaintiff, upon his examination in chief: "Do you know of any other accidents at this crossing, Mr. Fajardo?" to which question counsel for defendant objected and the court allowed the same to be answered. Whereupon, counsel for defendant duly excepted to the ruling of the court.

During the examination of the witness Celso Leon, counsel for plaintiff, in the examination in chief, asked: "At that crossing, state whether or not there ever was a gate and watchman?" Which question was objected to by counsel for defendant because the defendant company was not under obligation to maintain a gate or watchman at the said crossing, which objection the court overruled and defendant, by its counsel, then and there duly excepted.

In the examination of the witness Isaac Gonzalez, counsel
24 for plaintiff, in the examination in chief, asked the said witness: "State whether or not there was a watchman there?" To which question counsel for defendant objected, which objection was by the court overruled, and to which ruling counsel for the defendant company then and there duly excepted.

After hearing all the evidence and the argument of counsel, the court delivered the following charge:

GENTLEMEN OF THE JURY: I congratulate you on the approach of the termination of this protracted case, and I at the same time want to congratulate the attorneys for what I consider the very able and very thorough and excellent manner in which they have conducted the case and elicited the testimony and for their able presentation of the law and facts in the case as viewed by them respectively. They are the aids, gentlemen; counsel are employed to aid the court and the jury in throwing light on the presentation of the law and facts in the case as viewed by them respectively. They are the aids, gentlemen; counsel are employed to aid the court and the jury in throwing light on the presentation of the law and the facts of a given case. They are necessary and grow out of the fact that if we did not have counsel to present cases, every person who was injured would be obliged to conduct his own case, and hence cases would not be tried so thoroughly or as efficiently and the law that grows out of these cases would not be collected and presented to juries and courts with the clearness and the satisfaction they are now.

25 After all that light from the witnesses and the counsel and the authorities presented, your duties and mine begin, and that is on my part to present to you the views of the law as they have arisen in the case, and it is your part to take that view and that

construction of the law and apply it to the facts as you may find them according to the witnesses, it being emphatically and exclusively, not only your right, but your duty to scrutinize the testimony, and particularly the credibility of each witness' story; the probability of it, the opportunities of seeing, the intelligence, the capacity, the understanding, the interest or the bias, if you find it, and motives and inducements affecting the testimony of any witness. It is your duty, after hearing the testimony and seeing the witnesses, to consider and apply your conclusions to each and every witness and apply it in the determination of this case.

Now, gentlemen of the jury, this case has attracted very considerable attention in Porto Rico, but the questions involved are familiar and similar cases are of most frequent occurrence unfortunately in the United States, because both the State Courts and the Federal Courts are filled with cases known as grade crossing cases; known as negligent cases, known as contributory negligence cases, so that the principles involved are very familiar to courts and to lawyers. Of course the facts of each case differ and the law in its application is governed largely of course by the facts. Terms are used here which it is necessary for me to explain to you the legal definition of.

26 This is an action of negligence, known as an action for negligence for the wrongful killing of the daughter of the plaintiff in this case at the crossing, as has been testified to here, the wrongful and negligent action being this, as charged in the complaint. It is charged by the plaintiff,—and testimony has been offered in support of it—that this railroad company chartered under the laws of Porto Rico and operating in pursuance of the laws of Porto Rico, was obligated and bound by those laws to maintain at a crossing in evidence here, a watchman and a gate to prevent accidents. They complied with that law, according to the evidence, for two or three years, several years possibly, but in August, 1899, at the time of the devastating cyclone on this island, the watchman's house was destroyed and the gate injured, and from that time to the present, so far as the evidence is concerned in this case, neither the watchman nor the gate at that crossing was restored or maintained.

It is contended on the part of the plaintiff that had this plain legal duty, devolving upon this company defendant, been performed, been complied with on the occasion of this accident, that the accident could not have occurred. That is, if the gate had been across the crossing and the watchman there attending to his duties, it being at broad daylight, the accident would have been prevented, and that the failure to maintain a watchman and a gate at the crossing there was the cause, the efficient cause of this accident, and was such negligence in itself that made this company liable to the plaintiff for damages. The same law required other duties on the part

27 of this company. It required duties that are known in other States as common law duties, but they are incorporated in the laws of Porto Rico as part of the statute; that the whistle should be blown and the bell rung and the train slow up as it approached crossings of this character.

The proof tends to show, and is set up here by the defense, that these requirements of the common law and requirements of the statute of Porto Rico were complied with, and that in that they were not negligent. That, in turn, is contested by conflicting testimony on the part of the plaintiff, but in reference to the gate and the watchman, the company stands here acknowledged and admitted failing to comply with that part of the law in requiring them to maintain a watchman and gate at that crossing. The other provisions of the law they say they have complied with, and offer testimony tending to support that.

That testimony is for you to consider in connection with the testimony in answer to it, offered by the plaintiff, denying that the whistle blew or that the bell was rung or that the train slacked up. You saw the witnesses; you heard their testimony; you heard their description of the circumstances of this unfortunate disaster, the striking of the carriage, the stopping of the train some distance beyond the crossing. All those circumstances were detailed with great minuteness before you, and it is for you, gentlemen, to take the testimony of both sides, of all the witnesses detailing those circumstances, and to consider and apply it to this case.

Now, the plaintiff contends as a matter of law—and asked
28 me to so charge,—that the failure to maintain the watchman and the gate and continue them there at the crossing was such a failure of law, violation of law, such a flagrant neglect of duty on the part of this defendant that, no matter if plaintiff himself, by his driver, was guilty of contributory negligence, that the action would not be barred or defeated on that account.

It is proper to explain to you, gentlemen, that in all actions for negligence, including this, the general principle is that a party bringing a suit for negligence must himself be absolutely free from negligence, no matter how negligent the defendant has been. Ordinarily the rule is that courts and juries are not allowed to measure which is the more negligent, hence if any degree of negligence in ordinary cases is shown to have been occasioned by the plaintiff, his right of action is barred and defeated. That is the general rule of negligence cases. But in this case a different rule prevails and it is proper for you to apply it.

Now we start, gentlemen of the jury, with the confessed or proven failure of this company to maintain a gate or a watchman, as required by law, which is negligence in itself. Now, notwithstanding the negligence of the railway company, the plaintiff,—and the plaintiff here is represented, there is no dispute about it, by his agent, the driver. The driver or coachman is considered the agent, and, in that connection, any of his acts of negligence, incompetence or want of skill or anything of that kind are visted upon the plaintiff, and for the purposes of this case, his conduct, and his action, if reckless,
if wanton, if in disregard of ordinary prudence, ordinary
29 precautions of a prudent man, all of those things, if he was guilty of them, inure against the plaintiff, and if the driver was guilty of gross negligence or wantonly crossed that track, when by stopping a few moments he had time to see, if he chose to whip

up his horses and run the risk of crossing that track, in that case, gentlemen, if you find that was the fact, there can be no recovery whatever against this defendant. Because that would be such gross, wanton and reckless conduct on the part of the driver, which would be visited on the plaintiff, as to defeat this action.

Now, if from the evidence you find that the driver was not guilty of negligence to such an extent as to justify you in finding that it was gross, wilful or wanton, but that by the exercise of ordinary common sense, ordinary precautions, he had time when he got within a certain distance of the railroad track to see it, five feet or ten feet off, whatever the testimony was, and he could have checked his horses, and he neglected to look up the track or to take any precautions, if you find that, that would be a minor degree of negligence. It would be a mistake on his part, and in that event you would be entitled to take that fact into consideration, of his negligence in not looking up and down the track or stopping when he got close enough to the track to see it. You would be justified and it would be your duty, if you believed the testimony on that subject, to take the testimony on that subject into consideration in cutting down or mitigating any damages you may be disposed to allow in the case. Now I hope you catch the distinction. If the
30 action of the driver, from the evidence, was rash, wanton, wilful and reckless in trying to cross the railroad track without looking, in the thought that he could cross before the train reached the crossing, and he made a mistake in his calculation and the train struck the hind part of that carriage and caused this unfortunate accident and the loss of life, then that is such reckless and wanton conduct as would defeat the action entirely, and your verdict would be for the defendant if you find that fact.

On the other hand, if you find a lesser degree of negligence, amounting to what is called want of ordinary care that a prudent man would exercise in crossing that place, then you have a right to take that into consideration, not to defeat the entire action, but to affect the extent of damages and make the damages, if you find any were suffered, correspondingly less.

Now, gentlemen of the jury, coming to the question of damages, these kinds of actions are not of very frequent occurrence in most of the States of the Union. They are brought to recover the loss of the prospective earning power of a minor. Parents are entitled in most of the States to whatever their children earn until they are twenty-one years of age. And in the State Courts and Courts of the United States, the measure of damages allowed is what would be the earning power of a child until he was twenty-one years of age, less the cost of maintenance, assuming him to be wrongfully killed by the negligence of the defendant. This suit presents the case of a young lady seventeen years of age, the daughter of a respected citizen, a young lady who had graduated from school, was about
31 entering society. There is no evidence here for your consideration, that I heard, about any pecuniary value that the father expected to reap from her. Her station, position and all that we heard no testimony on. In the measure of damages, if there is

any, earning power which he would be entitled to would be one element of damages. There is no proof offered on the subject of the pecuniary value of this girl's life. I mean in the earning power. You cannot estimate, indeed it would be abhorrent to proper sentiments and good feeling to put a measure of damages upon affectionate daughter, wife or child. They are not looked upon as horses or cattle; you say they are worth so much. The law does not allow you to say the girl is worth $15,000 or $20,000. All those terms of the valuation of human life are repugnant and are not the measures that the law allows for ascertaining the value, or the loss rather, of a human life under these circumstances. The rules governing the allowance of damage in a case of this kind for a daughter are fixed by the courts in many cases, and I shall read to you what the courts say upon that subject so that you will not be carried away by any feeling or mistaken sentiments because the courts have fixed upon the jury and lawyers and upon other courts the rules governing them, and I could not allow you, under those laws, to take this case and make up your verdict from your sweet fancy in any amount you see fit.

While you are governed and required by the statutes of Porto Rico to render just damages, if you find damages are to be allowed, those just damages are controlled by rules and regulations which
32 prevent anything like conjecture or guess work.

The court has said that damages should be confined to the pecuniary loss suffered by the mother,—in a case where a mother brought a suit for the loss of her son—and the loss of the comfort, society, support and protection of the deceased.

Now those seem to be the limitations put upon the allowance of damages here; the comfort and the society, the support and protection of deceased, and you heard the testimony on that subject; that the father had educated this young lady; that she was a comfort to him and he enjoyed her society, which would be natural, and death has deprived him of that.

You will observe, gentlemen of the jury, that the law is very limited in its enumeration of allowances in such a case as this, the comfort, the loss of society and the protection. Nothing is to be allowed, by the terms of the law, for the mental anguish of the parent or grief. That seems to be eliminated from it. Of course in the enumeration of these points here, these decisions, the loss of the society might cover that. The loss of the society of such a child as this young lady was described, the comfort and the pleasure and the enjoyment are matters that the jury will have to apply that rule to, confined to those elements of damages. It is entirely limited to that. As I said before, I don't recall any testimony here about the pecuniary loss that the father sustained in this case. No evidence was offered on that subject and I cannot state that, in the absence
33 of any evidence on that subject, you are at liberty to go into the domain of conjecture in reference to the pecuniary loss that has been sustained, there being no proof on that subject. But there is proof and evidence growing out of the circumstances of this case for you to take into consideration, if damages are adjudged by

you to be proper in the case under the evidence, as to the loss of companionship and society and comfort of this young lady to her father, the affection existing between them.

No, gentlemen of the jury, the testimony has been rehearsed to you so fully that I won't pretend to retail or allude to that. My function is discharged when I have laid down the principles of law, as I take them, applicable to this case, and lest I might overlook some of the principles of law, the counsel on both sides have asked that I give you certain instructions which they have prepared, bearing upon the case, and I will read those points that I have affirmed, and they will probably cover any points that I have omitted in my charge.

The defendant, before the jury retired, excepted to the following parts of the foregoing charge, to-wit:

"It is contended on the part of the plaintiff that had this plain legal duty, devolving upon this company defendant, been performed, been complied with on the occasion of this accident, that the accident could not have occurred. That is, if the gate had been across the crossing and the watchman there attending to his duties, it
34 being at broad daylight, the accident would have been prevented, and that the failure to maintain a watchman and a gate at the crossing there was the cause, the efficient cause of this accident, and was such negligence in itself that made this company liable to the plaintiff for damages. The same law required other duties on the part of the company. It required duties that are known in other States as common law duties, but they are incorporated in the laws of Porto Rico as part of the statute; that the whistle should be blown and the bell rung and the train slow up as it approached crossings of this character."

Also to that part of the charge as follows: "Now we start, gentlemen of the jury, with the confessed or proven failure of this company to maintain a gate or a watchman, as required by law, which is negligence in itself."

The foregoing exceptions were stated by the defendant at the time to be based upon the fact that no law of Porto Rico at the time of the accident required the maintenance of a gate or watchman at the crossing where the accident occurred. And defendant insists that the court erred in holding that the police law of railroads, which was in force in Spanish times, was continued after the American occupation, for the reason that its provisions and terms were entirely inconsistent with the new government created by the Organic Act of April 12, 1900, by reason of which said so-called police law of railroads was impossible of application and enforcement.

Also defendant excepted to that part of the charge as follows:

"Now, if from the evidence you find that the driver was not
35 guilty of negligence to such an extent as to justify you in finding that it was gross, wilful or wanton, but that by the exercise of ordinary common sense, ordinary precaution, he had time when he got within a certain distance of the railroad track to see it, five feet or ten feet off, whatever the testimony was, and he could

have checked his horses and he neglected to look up the track or to take any precautions, if you find that, that would be a minor degree of negligence."

Also to that part of the charge as follows: "If the action of the driver, from the evidence, was rash, wanton, wilful and reckless in trying to cross the railroad track without looking, in the thought that he could cross before the train reached the crossing and he made a mistake in his calculation and the train struck the hind part of that carriage and caused this unfortunate accident and the loss of life, then that is such reckless and wanton conduct as would defeat the action entirely, and your verdict would be for the defendant if you find that fact."

"On the other hand, if you find a lesser degree of negligence, amounting to what is called want of ordinary care that a prudent man would exercise in crossing that place, *then you have a right to take that into consideration, not to defeat the entire action, but to affect the* extent of damages and make the damages, if you find any *were suffered, correspondingly less.*"

Also to the action of the court, during the progress of said charge, in reading from a law book upon the measure of damages,
36 to the effect that damages are limited to the loss of comfort and society of the deceased.

Thereafter, and upon the conclusion of the said charge, the court ave the following instructions in behalf of plaintiff, which were n and there excepted to by the defendant.

First. If you find a verdict in favor of the plaintiff, in determing the amount of the damages, you are instructed as follows:

The laws of Porto Rico provide that a father may maintain an action for the death of his minor child, when such death is caused by the wrongful act or neglect of another, that such damages may be given as, under all the circumstances of the case, be just. And in determining this question you are to take into consideration all the circumstances of the case, the age of the deceased, the kind of a girl she was, and take into consideration the assistance that she might have been to the parents in future years, and you may also consider the loss of society and comfort and the reliance that they could place upon her in future years. And you may take into consideration all these things in determining what the plaintiff- should receive as compensation for the loss they have received.

Answer. Gentlemen, that is the law properly stated and I affirm that point.

Second. The laws of Porto Rico require that where railroads cross other roads on the same level, gates shall be constructed which shall only be opened when vehicles and cattle cross the track, and if the jury believe from all the evidence in the case that the point
37 where the accident happened was at the crossing of the public highway, extending between San German and Mayaguez, and the defendant's railroad tracks, and that at this crossing there were no gates as required by law, and that if the gates had been there and had been closed as the coach containing the deceased approached the

said crossing, the accident would not have happened, then the jury will return a verdict for the plaintiff.

Answer. That point is affirmed. If the gate was up and closed and all, it is for you to determine whether, as a matter of facts the accident would have happened at all.

Third. The burden of proof of contributory negligence is on the defendant and must be proved by a preponderance of evidence.

Answer. That point is affirmed. The defense set up here is that the plaintiffs themselves were guilty of contributory negligence and not entitled to recover. Having undertaken to prove that, the burden is upon the plaintiff to prove it by a preponderance of the evidence. That does not mean the greater number of witnesses. You have a right to observe the character of the witnesses, their greater or less degrees of intelligence, their interest, their motives and greater opportunities for observing. You pass upon those questions in determining the question of preponderance of evidence.

Defendant then and there, and before the jury retired, requested of the court the following instruction:

(5) The court instructs the jury that at this railroad crossing the train of defendant company had the right of way and the
38 agents and employés of defendant in charge thereof were held to the exercise of only ordinary care and diligence to avoid accidents at such crossing. And if you believe from the evidence that the fireman and engineer on the train which caused the accident gave the warning whistles and rang the bell as testified to by them, and upon the engineer seeing the coach at about fifty meters distant from the crossing, both he and the fireman did all that they could reasonably do to stop the train and avoid the collision, then you will find for the defendant.

Which instruction the court refused to give as requested, but modified it as follows:

Answer. This instruction is affirmed, with the qualification however, that the full performance of all duties imposed by law and the exercise of ordinary care to prevent the accident by stopping the train before the collision and accident, did not relieve defendant company from the further duty imposed by law to maintain a gate and watchman at said crossing as precautions to prevent accidents at crossing. Nor did absence of gate and watchman at crossing by defendant, facts, if well known for several years to the coachman and at time of accident, if you so find from the testimony, did not relieve plaintiffs from the exercise of ordinary care, and if the coachman of plaintiff attempted to cross tracks, knowing and seeing no gate there, he was guilty of such contributory negligence, which, if jury finds to be only the want of ordinary care and negligence, should operate to reduce and mitigate amount of damages to plain-
39 tiff, if any are to be found by the jury. If the jury, however, should find that the driver of plaintiff, on approaching the tracks at the crossing and well knowing and observing no gate to be maintained at said crossing, undertook without stopping or looking for trains on the track, and that the said driver of plaintiff whipped his horses and undertook to so cross the tracks under said circum-

stances in evidence, such action of driver would be such reckless, rash and gross negligence as to entirely defeat the right of plaintiff to recover in this action. Rash, wanton or gross negligence in law operates to defeat a plaintiff's right to recover, but it is the duty of the jury and not of the court to find the facts and circumstances in evidence alleged to constitute either ordinary or gross, wanton negligence of plaintiff's driver.

Also because the court refused to give the following instruction asked by defendant:

(6) If you believe from the evidence that the coachman Rodriguez stopped at any place before reaching the crossing at a point where he could not see nor hear the approaching train and then started to cross the track without again stopping, looking or listening at any point up the track itself, where, under the evidence, you may believe that he could have seen or heard the approaching train, this conduct on the part of the coachman was reckless and wanton and made him guilty of contributory negligence, notwithstanding you believe from the evidence that no chain, gate or watchman were at said crossing.

40 Which instruction the court modified as follows:

Answer. Affirmed with same qualifications as specified in the foregong point regarding failure of duty of defendant under the law to maintain a gate and watchman at the crossing, and the correlative obligation of plaintiff's driver with knowledge of years and seeing at time the removal of gate, to exercise a degree of ordinary care and prudence at so dangerous a crossing as the evidence tends to prove the one in dispute in.

Defendant excepted to the action of the Court in refusing to give instruction No. 9 asked by it as follows:

(9.) The court instructs the jury that defendant company was not obliged by law to maintain a chain, gate or watchman at the crossing where the accident occurred and that it and its servants and employés in the operation of the trains were only held to the exercise of ordinary diligence in avoiding accident at that place.

The above instruction was modified by the court as follows:

Answer. Under existing laws of Porto Rico continued under the express provisions of the Foraker Law and amendments, under which Congress of United States created government of Porto Rico, the police regulation governing operation of railroads, requiring maintenance of gates at crossing of railroad for safety of human life is compatible with the laws of United States and of Porto Rico, never having been repealed. This point as stated is refused.

41 Defendant excepted to the action of the court in refusing to give instruction No. 10 asked by it as follows:

(10.) As to ordinary diligence and the ordinary and reasonably safe appliances, the court is asked to instruct the jury that they will take into consideration the character of the railway, the purposes for which it was used, the general nature of the country and the demands of the people, and you are instructed that under all those circumstances defendant company was only required to use ordinary safe appliances and locomotives and cars and was not required

to have as high a degree of perfection as may exist in the best railways of the world.

Which instruction the court modified as follows:

Answer. All this instruction is affirmed as law, but with the qualification that all this care, caution and exercise of high order of care by defendant must be considered with reference to the duty imposed by law to maintain a gate at the grade crossing in question and the failure of duty of defendant to maintain said gate.

Defendant also excepted to the action of the court in refusing to give instruction No. 11 asked by it as follows:

(11.) The jury are instructed that if you should decide to award damages to plaintiff, you can only allow such damages as have been proven in the case. And if you believe from the evidence that plaintiff, because of his position, has not been deprived of any financial support or assistance by reason of the death of his said daughter, then you cannot award any damages to plaintiff therefor.

42 You are further instructed that in awarding damages you are not at liberty to allow damages on the ground of sympathy, sentiment or speculation, but such damages must be the result of positive proof and of financial or pecuniary loss clearly established by preponderance of the evidence.

Which instruction the court modified as follows:

Answer. The words of the law require, if you find for plaintiff under the evidence, that you allow such damages as you may, under the evidence and circumstances, consider as just, and with this qualification, this instruction is affirmed.

The defendant further prayed the court for a peremptory instruction in favor of defendant, which instruction the court refused to give.

To all of which rulings, defendant at the time duly excepted.

The jury thereupon retired to consider their verdict, and, having returned into court a verdict for plaintiff for the sum of sixteen hundred dollars ($1600.), a motion for new trial and in arrest of judgment was filed by defendant, which said motion for new trial and in arrest of judgment was overruled.

And now, in furtherance of justice and that right may be done the defendant, it tenders and presents the foregoing as its bill of exceptions to the action of the court, and prays that the same

43 be allowed and settled and signed and sealed by the court and made a part of the record, and the same is accordingly done this 19th day of June, A. D. 1905.

CHAS. F. McKENNA, *Judge.*

44 In the District Court of the United States for Porto Rico, Sitting at Mayaguez.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Assignment of Errors.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred upon the trial of the cause, to-wit:

1.

That the Court erred in overruling the plea to the jurisdiction herein, for the reason that this action was instituted and tried at a special term (there being no regular term authorized by law to be held) in the city of Mayaguez, and therefore, by virtue of the provisions of Section 670 of the Revised Statutes of the United States, the District Court of the United States for Porto Rico had no jurisdiction to try this cause before a jury at such special term of the said Court begun and held at the city of Mayaguez aforesaid.

2.

That the Court erred in overruling defendant's demurrer to the complaint.

45 3.

That the Court erred in overruling the objection of counsel for defendant to the following question: "Is there or is there not a gate there?" asked of the witness José Remote y Fajardo.

Also in overruling the objection of counsel for defendant to the following question: "Do you know of any other accidents at this crossing, Mr. Fajardo?" asked of the witness Don Mateo Fajardo.

Also in overruling the objection of counsel for the defendant to the following question: "At that crossing state whether or not there ever was a gate and watchman?" asked of the witness Celso Leon.

Also in overruling the objection of counsel for the defendant to the following question: "State whether or not there was a watchman there?" asked of the witness Isaac Gonzalez.

4.

That the Court erred in giving the following instructions during the course of the charge to the jury:

"It is contended on the part of the plaintiff that had this plain legal duty, devolving upon this company defendant, been performed, been complied with on the occasion of this accident, that the accident could not have occurred. That is, if the gate had been across the

crossing and the watchman there attending to his duties, it being at broad daylight, the accident would have been prevented, and that the failure to maintain a watchman and a gate at the crossing
46 there was the cause, the efficient cause of this accident, and was such negligence in itself that made this company liable to the plaintiff for damages. The same law required other duties on the part of the company. It required duties that are known in other States as common law duties, but they are incorporated in the laws of Porto Rico as part of the statute; that the whistle should be blown and the bell rung and the train slow up as it approached crossings of this character."

"Now, we start, gentlemen of the jury, with the confessed or proven failure of this company to maintain a gate or a watchman, as required by law, which is negligence in itself."

"Now, if from the evidence you find that the driver was not guilty of negligence to such an extent as to justify you in finding that it was gross, wilful and wanton, but by the exercise of ordinary common sense, ordinary precaution, he had time when he got within a certain distance of the railroad track to see it, five feet or ten feet off, whatever the testimony was, and he could have checked his horses and he neglected to look up the track or to take any precautions, if you find that, that would be a minor degree of negligence. It would be a mistake on his part, and in that event you would be entitled to take that fact into consideration, of his negligence in not looking up and down the track or stopping when he got close enough to the track to see it. You would be justified and it would be your duty, if you believe the testimony on that subject, to take the testimony on that subject into consideration in cutting down or mitigating any
47 damages you may be disposed to allow in the case."

"If the action of the driver, from the evidence was rash, wanton, wilful and reckless in trying to cross the railroad track without looking, in the thought that he could cross before the train reached the crossing, and he made a mistake in his calculation and the train struck the hind part of that carriage and caused this unfortunate acident and the loss of life, then that is such reckless and wanton conduct as would defeat the action entirely, and your verdict would be for the defendant if you find that fact. On the other hand, if you find a lesser degree of negligence, amounting to what is called want of ordinary care that a prudent man would exercise in crossing that place, then you have a right to take that into consideration, not to defeat the entire action, but to affect the extent of damages and make the damages, if you find any were suffered, correspondingly less."

5.

That the Court erred in reading from a law book upon the measure of damages, during the course of said charge, to the effect that damages are limited to the loss of comfort and society of the deceased.

6.

That the Court erred in giving the following instructions requested by the plaintiff, together with modifications:

First. If you find a verdict in favor of the plaintiff, in determining the amount of the damages, you are instructed as follows:

48 The laws of Porto Rico provide that a father may maintain an action for the death of his minor child, when such death is caused by the wrongful act or neglect of another, that such damages may be given as, under all the circumstances of the case, be just. And in determining this question you are to take into consideration all the circumstances of the case, the age of the deceased, the kind of a girl she was, and take into consideration the assistance that she might have been to the parents in future years, and you may also consider the loss of society and comfort and the reliance that they could place upon her in future years. And you may take into consideration all these things in determining what the plaintiff should receive as compensation for the loss they have received.

Answer. Gentlemen, that is the law properly stated and I affirm that point.

Second. The laws of Porto Rico require that where railroads cross other roads on the same level, gates shall be constructed which shall only be opened when vehicles and cattle cross the track, and if the jury believe from all the evidence in the case that the point where the accident happened was at the crossing of the public highway, extending between San German and Mayaguez, and the defendant's railroad tracks, and that at this crossing there were no gates as required by law, and that if the gates had been there and had been closed as the coach containing the deceased approached the said crossing, the accident would not have happened, then the jury will return a verdict for the plaintiff.

49 Answer. That point is affirmed. If the gate was up and closed and all, it is your duty to determine whether, as a matter of fact, from the evidence, the accident would have happened at all.

Third. The burden of proof of contributory negligence is on the defendant and must be proved by a preponderance of evidence.

Answer. That point is affirmed. The defense set up here is that the plaintiffs themselves were guilty of contributory negligence and not entitled to recover. Having undertaken to prove that, the burden is upon the plaintiff to prove it by a preponderance of the evidence. That does not mean the greater number of witnesses. You have a right to observe the character of the witnesses, their greater or less degrees of intelligence, their interest, their motives and greater opportunities for observing. You pass upon those questions in determining the question of preponderance of evidence.

7.

That the Court erred in refusing to give to the jury the following instructions requested by defendant and in modifying same.

5. The Court instructs the jury that at this railroad crossing the train of defendant Company had the right of way and the agents and employés of defendant in charge thereof were held to the exercise of only ordinary care and diligence to avoid accidents at such crossings. And if you believe from the evidence that the fireman

and engineer on the train which caused the accident gave the warning whistles and rang the bell as testified to by them, and upon the engineer seeing the coach at about fifty metres distant from
50 the crossing both he and the fireman did all that they could reasonably do to stop the train and avoid the collision, then you will find for the defendant.

Which instruction the Court modified as follows:

Answer. This instruction is affirmed, with the qualification however, that the full performance of all duties imposed by law and the exercise of ordinary care to prevent the accident by stopping the train before the collision and accident, did not relieve defendant company from the further duty imposed by law to maintain a gate and watchman at said crossing as precautions to prevent accidents at crossing. Nor did absence of gate and watchman at crossing by defendant, facts, if well known for several years to the coachman and at time of accident, if you so find from the testimony, did not relieve plaintiffs from the exercise of ordinary care, and if the coachman of plaintiff attempted to cross tracks, knowing and seeing no gate there, he was guilty of such contributory negligence, which, if jury finds to be only the want of ordinary care and negligence, should operate to reduce and mitigate amount of damages to plaintiff, if any are to be found by the jury. If the jury, however, should find that the driver of plaintiff, on approaching the tracks at the crossing and well knowing and observing no gate to be maintained at said crossing, undertook without stopping or looking for trains on the track, and that the said driver of plaintiff whipped his horses and undertook to so cross the tracks under said circumstances in evidence, such action of driver would be such reckless, rash and
51 gross negligence as to entirely defeat the right of plaintiff to recover in this action. Rash, wanton or gross negligence in law operates to defeat a plaintiff's right to recover, but it is the duty of the jury and not of the Court to find the fact and circumstances in evidence alleged to constitute either ordinary or gross, wanton negligence of plaintiff's driver.

(6) If you believe from the evidence that the coachman Rodriguez stopped at any place before reaching the crossing at a point where he could not see nor hear the approaching train and then started to cross the track without again stopping, looking or listening at any point up to the track itself, where, under the evidence, you may believe that he could have seen or heard the approaching train, this conduct on the part of the coachman was reckless and wanton and made him guilty of contributory negligence, notwithstanding you believe from the evidence that no chain, gate or watchman were at said crossing.

Which instruction the Court modified as follows:

Answer. Affirmed with same qualifications as specified in the foregoing point regarding failure of duty of defendant under the law to maintain a gate and watchman at the crossing, and the correlative obligation of plaintiff's driver with knowledge of years and seeing at time the removal of gate, to exercise a degree of ordinary care and prudence at so dangerous a crossing as the evidence tends to prove the one in dispute is.

52 (9) The Court instructs the jury that defendant company was not obliged by law to maintain a chain, gate or watchman at the crossing where the accident occurred and that it and its servants and employés in the operation of the trains were only held to the exercise of ordinary diligence in avoiding accident at that place.

Which instructions the Court modified as follows:

Under existing laws of Porto Rico continued under the express provisions of the Foraker Law and amendments, under which Congress of the United States created government of Porto Rico, the police regulations governing operation of railroads, requiring maintenance of gates at crossing of railroad for safety of human life is compatible with the laws of United States and of Porto Rico, never having been repealed. This point as stated is refused.

(10) As to ordinary diligence and the ordinary and reasonably safe appliances, the Court is asked to instruct the jury that they will take into consideration the character of the railway, the purposes for which it was used, the general nature of the country and the demands of the people, and you are instructed that under all those circumstances defendant company was only required to use ordinary safe appliances and locomotives and cars and was not required to have as high a degree of perfection as may exist in the best railways of the world.

Which instruction the Court modified as follows:

53 Answer. All this instruction is affirmed as law, but with the qualification that all this care, caution and exercise of high order of care by defendant must be considered with reference to the duty imposed by law to maintain a gate at the grade crossing in question and the failure of duty of defendant to maintain said gate.

(11) The jury are instructed that if you should decide to award damages to plaintiff, you can only allow such damages as have been proven in the case. And if you believe from the evidence that plaintiff, because of his position, has not been deprived of any financial support or assistance by reason of the death of his said daughter, then you cannot award any damages to plaintiff therefor.

You are further instructed that in awarding damages you are not at liberty to allow damages on the ground of sympathy, sentiment of speculation, but such damages must be the result of positive proof and of financial or pecuniary loss clearly established by preponderance of the evidence.

Which instruction the Court modified as follows:

Answer. The words of the law require, if you find for plaintiff under the evidence, that you allow such damages as you may, under the evidence and circumstances, consider as just, and with this qualification, this instruction is affirmed.

8.

That the Court erred in entering judgment in favor of the plaintiff and against defendant for the sum of sixteen hundred
54 dollars ($1600.00).

Wherefore the defendant prays that the judgment of the said District Court of the United States for Porto Rico be reversed.

F. H. DEXTER,
Attorney for Defendant.

55 JULIO P. CASTRO
v.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Writ of Error.

The President of the United States to the Honorable the Judge of the District Court of the United States for Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States for Porto Rico before you between The American Railroad Company of Porto Rico, Plaintiff in Error, and Julio P. Castro, Defendant in Error, a manifest error hath happened to the great damage of the said American Railroad Company of Porto Rico, Plaintiff in Error, as by its complaint appears.

We being willing that error if any hath been should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington at this the October Term 1905 of the Supreme Court of the United States, then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and
56 customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this seventeenth day of October, nineteen hundred and five. *Nunc pro tunc* as of June first 1905.

No seal.

H. H. SCOVILLE,
Clerk of the District Court of the United States for Porto Rico.
By EDWARD GRINDROD, *Deputy.*

Allowed by
CHAS. F. McKENNA,
Judge of the District Court of the United States for Porto Rico.

[Seal United States District Court for the District of Porto Rico.]

I hereby certify that a copy hereof has been lodged in my office.
H. H. SCOVILLE, *Clerk.*

57 [Endorsed:] Julio P. Castro *v.* American Railroad Company of Porto Rico. Writ of Error. Filed Clerk's Office, United States District Court. Oct. 17 1905. *Nunc pro tunc* as of June 1st, 1905. H. H. Scoville, Clerk of the Court. By Edw. Grindrod, Deputy. F. H. Dexter Attorneys and Counsellors at Law. San Juan, Porto Rico, W. I.

58 In the District Court of the United States for Porto Rico, Sitting at Mayaguez.

JULIO P. CASTRO
v.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Citation.

The President of the United States to Julio P. Castro and Messrs. Horton & Cornwell, his attorneys, Greeting.

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at the City of Washington, D. C., at the first day of the next October Term thereof, pursuant to writ of error filed in the Clerk's office of the District Court of the United States for Porto Rico, in the case wherein The American Railroad Company of Porto Rico is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness The Honorable Charles F. McKenna, Judge of the District Court of the United States for Porto Rico this 14th day of October, 1905.

CHAS. F. McKENNA,
Judge of the District Court of the United States for Porto Rico.

Attest:

[Seal United States District Court for the District of Porto Rico.]

H. H. SCOVILLE, *Clerk,*
By EDW. GRINDROD, *Deputy.*

59 *Return on Service Writ.*

UNITED STATES OF AMERICA, *The District of Porto Rico, ss:*

I hereby certify and return that I have served the annexed Citation on the therein-named Horton & Cornwell by handing to and leaving a true and correct copy thereof with F. L. Cornwell, a member of the said firm of Horton & Cornwell personally at Mayaguez in said District on the 19th day of October, A. D. 1905.

H. S. HUBBARD, *U. S. Marshal,*
By RALEIGH F. HAYDON, *Deputy.*

60 [Endorsed:] Julio P. Castro *v.* American R. R. Co. of Porto Rico. Citation. Filed Clerk's Office, United States District Court. Oct. 14, 1905. H. H. Scoville, Clerk of the Court. By Edw. Grindrod, Deputy. F. H. Dexter Attorney and Counsellor at Law San Juan, Porto Rico, W. I.

61 THE UNITED STATES OF AMERICA,
District of Porto Rico, ss:

I, H. H. Scoville, Clerk of the District Court of the United States for Porto Rico, hereby certify that the above and foregoing transcript, containing 54 pages, from 1 to 54 inclusive, is a true and correct transcript of the record and proceedings in the cause entitled therein between Julio P. Castro and the American Railroad Company of Porto Rico, as the same remains of record and on file in the office of the Clerk of said Court, and that the same constitute- the return to the annexed writ of error.

In testimony whereof I have hereunto set my hand, and affixed the seal of said District Court this the sixth day of November, A. D. 1905.

[Seal United States District Court for the District of Porto Rico.]

H. H. SCOVILLE,
Clerk District Court of the United States for Porto Rico.

62 In the District Court of the United States for Porto Rico.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Bond of Writ of Error.

Know all men by these presents, that we, the American Railroad Company of Porto Rico, as principal, and A. Duval and Vicente Fano as sureties, are held and firmly bound unto Julio P. Castro, plaintiff above named, in the sum of four thousand dollars ($4,000.-00), to be paid to the said Julio P. Castro, his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated the seventeenth day of June, 1905.

Whereas, the above named defendant, the American Railroad Company of Porto Rico, has sued out a writ of error to the Supreme Court of the United States to reverse the judgment in the above entitled cause by the District Court of the United States for Porto Rico.

Now, therefore, the condition of this obligation is such that if the above named American Railroad Company of Porto Rico shall prosecute said writ to effect and answer all costs and damages, if it shall

fail to make good its plea, then this obligation shall be void;
63 otherwise to remain in full force and virtue.

AMERICAN RAILROAD COMPANY
OF PORTO RICO,
By A. DUVAL, *Manager.*
A. DUVAL.
VICENTE FANO.

UNITED STATES OF AMERICA, *District of Porto Rico, ss:*

A. Duval and Vicente Fano, being duly sworn upon their oaths, respectively, say that they are each worth the sum of four thousand dollars ($4,000.00) in visible property in Porto Rico, over and above all liabilities and exemptions.

A. DUVAL.
VICENTE FANO.

Subscribed and sworn to before me this 17th day of June, 1905.

[COURT SEAL.] H. H. SCOVILLE,
Clerk District Court of the
United States for Porto Rico.

This bond approved this 17th day of June, 1905.
CHAS. F. McKENNA, *Judge.*

UNITED STATES OF AMERICA, *District of Porto Rico, ss:*

I, H. H. Scoville, Clerk of the District Court of the United States for Porto Rico, do hereby certify that the foregoing is a true copy of the "Bond on Writ of Error" filed in the case of Julio P. Castro *vs.* American Railroad Company of Porto Rico.

Witness my official signature and the seal of said Court at San Juan, in said District, this 23d day of November, A. D. 1905, and in the 130th year of the Independence of the United States of America.

[Seal United States District Court for the
District of Porto Rico.]

H. H. SCOVILLE, *Clerk.*

64 [Endorsed:] 489, 19991. 489, 19991, Dec. 9, '05.

65 [Endorsed:] File No. 19,991. Supreme Court U. S. October Term, 1905. Term No. 489. Julio P. Castro, P'l'ff in Error, *vs.* American R. R. Co. of Porto Rico. Writ of Error Bond. Filed Dec. 8", 1905.

Endorsed on cover: File No. 19,991. Porto Rico D. C. U. S. Term No. 151. The American Railroad Company of Porto Rico, plaintiff in error, *vs.* Julio P. Castro. Filed November 16th, 1905. File No. 19,991.